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Supreme Court of the United States

October Term, 1964.

No. 201.

WILLIAM W. SCRANTON, Governor, et al.,
Appellants,

v.

IRA WALTON DREW, et al.,
Appellees.

On Appeal From the United States District Court for the Middle District of Pennsylvania.

REPLY TO "SUPPLEMENT TO JURISDICTIONAL STATEMENT".

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IN THE

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On Tuesday, September 29, 1964 the Supreme Court of Pennsylvana filed its opinion in *Butcher v. Bloom*, declaring invalid the same Pennsylvania Apportionment Laws which the three-judge District Court had already declared invalid on April 14, 1964. On Friday of the same week appellees were served with the Commonwealth's "Supplement to Jurisdictional Statement", a document prepared apparently in great haste. In it the Commonwealth concedes that the 1964 Apportionment Legislation is invalid and thereby abandons the points raised in its appeal. Upon this admission, the decision of the Court below should be affirmed.

And for no apparent reason other than the preference of the opinion of the Pennsylvania Supreme Court over that of Judge Maris, the Commonwealth seeks to divest the three-judge District Court of jurisdiction to enforce its original decree. On analysis, the "Supplement to Jurisdictional Statement" is simply another elaborately contrived effort to oust the jurisdiction of the three-judge Court. This latest move, when viewed in the light of the prior abortive maneuvers at the outset of these cases, seems to be another attempt by the Commonwealth to choose what it obviously considers to be the more favorable forum.

Initially the plaintiffs in *Butcher* were intervening defendants in the District Court case.[1] At the hearing on the merits the Commonwealth and the intervening defendants jointly moved for a stay of the proceedings and requested the three-judge District Court to abstain, pending determination by the State Court. Both motions were dis-

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1. Although the nominal parties in both cases differ slightly, the Philadelphia Committee of Seventy and their attorneys appeared before both forums on *opposite* sides of the case.

On December 4, 1963 Donald C. Rubel and Anne D. McKinley, by their attorneys R. Lawrence Coughlin, Jr., Carter R. Buller and Edward E. Russell filed a motion for leave to intervene in this case as defendants. The intervening defendants appeared at the hearing on January 16, 17, 1964, filed motions requesting the Court to stay the proceedings and to abstain and, when these motions were denied, introduced testimony. On March 30, 1964, the intervening defendants through their attorneys, Buller and Russell, filed a motion for leave to withdraw on the grounds that they were the plaintiffs in the State Court proceedings which presented to the Supreme Court of Pennsylvania "certain of the issues now before" the District Court.

The entry of appearance for Butcher, Rubel and McKinley (the latter two individuals are the same parties who appeared in these proceedings) in the Supreme Court of Pennsylvania was filed by R. Lawrence Coughlin, Jr. And the Brief before that Court was signed, in addition, by Buller, Tyson W. Coughlin, Russell, Eugene F. Waye and Arthur E. Newbold, III. All of the named parties are members of the Philadelphia Committee of Seventy, a private organization which acts as a watchdog for good government in Philadelphia. The various attorney are appearing on behalf of the organization.

missed by the District Court, whereupon the intervening defendants then withdrew from that case and prosecuted the case in the State Court.

After the three-judge District Court filed its opinion and judgment on April 14, 1964, the Commonwealth appealed to this Court and, *despite the intervening decisions of this Court*, earnestly argued that the apportionment legislation was valid and the three-judge District Court was wrong.

Now comes the Commonwealth, no longer contending that the law is valid, yet persisting in the spurious contention that the three-judge Court was wrong, suddenly converted, not by the force of this Court's opinions, but solely on the basis that the Commonwealth is bound to obey the mandate of the Pennsylvania Supreme Court in *Butcher* and, therefore, waives its right of appeal in that case.

At this point, there no longer is any controversy over the validity of the 1964 Apportionment Laws of Pennsylvania. They have been found invalid both by the United States District Court and the Pennsylvania Supreme Court, and the Commonwealth no longer pretends otherwise.

But the case is by no means moot. The three-judge District Court, in accordance with Appellee's prayer, retained jurisdiction to insure enactment of a valid apportionment law in Pennsylvania. The supervisory duties of the District Court will not be terminated until such valid legislation is enacted.

The true remaining question, therefore, is one of enforcement—to insure that the Pennsylvania General Assembly will enact valid legislation in ample time for the election of legislators for the 1967 session of the Pennsylvania General Assembly. The relationship of the United States District Court and the Pennsylvania State Court in working this out should be considered in the first instance by the District Court on the basis of any motions made to it for stay or otherwise.

If the Commonwealth desires to stay the proceedings in the District Court for the reasons stated in its Supplement to Jurisdictional Statement or for any other reasons, it can file an appropriate motion with the District Court. The District Court is the proper forum to consider all the questions of equitable abstention and deference to state jurisdiction which the Commonwealth may decide to raise.

There is nothing in this case which merits the application of the doctrine of equitable abstention. The three-judge District Court so found in rejecting the previous motion for abstention. Cf. *Mann v. Davis*, 84 S. Ct. 1453 (1964). In any event, the three-judge District Court should have the opportunity to consider in the first instance whether it should now abstain. The District Court's jurisdiction should not be ousted peremptorily without affording that Court the opportunity to review the situation that now exists.

The Commonwealth is presuming to tell this Court that because the Commonwealth, one of the parties to this litigation, considers the opinion of the Supreme Court of Pennsylvania to be sounder than that of the three-judge District Court—a view from which we strenuously dissent—this Court without briefs, without arguments, without reviewing the respective records, and without even having the State Court litigation properly before it, should reverse the District Court and oust its jurisdiction.

Rather, this Court should either affirm the decision of the three-judge District Court, which admittedly is correct on the merits, or it should dismiss the appeal of the Commonwealth and remand the case to the District Court for implementation of its decree.[2]

2. There is ample precedent for this Court to dismiss the appeal without vacating the decree of the Court below. See, e.g., *Cantos v. Styer*, 329 U. S. 686 (1946); *Uyeki v. Styer*, 329 U. S. 689 (1946); *Pan American Airways Corp. v. W. R. Grace & Co.*, 332 U. S. 827 (1947); *Schenley Distilling Corp. v. Anderson*, 333 U. S. 878 (1948).

Moreover, the Commonwealth's request that this Court retain jurisdiction should also be denied. This Court should not be burdened with supervision in the first instance of enforcement procedures relating to a lower court's decree. This is peculiarly the function of the lower court which entered the decree. This Court will be interested only in reviewing the propriety of the discretion exercised by the District Court in enforcing its judgment.

We respectfully request, therefore, that the Commonwealth's application be denied, that the judgment of the District Court be affirmed and the case remanded to the United States District Court for further proceedings in connection with enforcement of its decree.

Respectfully submitted,

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